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In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FIRST BOSTON CORPORATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. INCORPORATED, SHEARSON LEHMAN BROTHERS, INC. AND SALOMON BROTHERS INC AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should reverse the longstanding rule that contribution is available under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 as promulgated by the Securities and Exchange Commission?

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INTEREST OF THE AMICI CURIAE

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the amici curiae submit this brief in support of respondents.

As leading investment banking firms, amici are involved in every facet of the securities marketplace—from

underwriting securities offerings, to selling and purchasing securities, to advising on securities issues and other securities transactions. Because of this participation, amici have a strong interest in the rules governing federal securities law litigation. The longstanding contribution rule under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, has resulted in a rational and equitable allocation of risks among participants in the capital markets. Because abolition of the rule would substantially affect amici, their views may be of substantial assistance to the Court's consideration of this case.

SUMMARY OF ARGUMENT

This Court has held that "a right to contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). The contribution rule under Section 10(b) meets both of these tests.

Given that Congress did not even contemplate a right of action under Section 10(b), it obviously did not expressly articulate its intent with respect to a right to contribution under that provision. This Court, however, has looked to analogous provisions of the securities laws of which Section 10(b) is a part in interpreting that section. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). Congress's provision of contribution in *every* express analogue to Section 10(b) in the securities acts demonstrates that Congress intended to couple joint and several securities law liability with a right to contribution. A right to contribution under Section 10(b) arises by "clear implication" from these unambiguous choices Congress made in every comparable provision of the securities laws.

Irrespective of whether Congress expressly articulated or clearly implied such a right, this Court also should endorse contribution under Section 10(b) as a matter of federal common law. Because the cause of action under Section 10(b) is a product of judicial, rather than legislative creation, its integral attributes must be analyzed under the same common law standards employed to create the action in the first instance. Accordingly, this Court has long interpreted the scope of the Section 10(b) action under flexible, policy-based, common law principles. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975). Those principles strongly favor contribution.

In addition to the legislative policy evidenced in every express counterpart of Section 10(b), historical and policy considerations support contribution. For the past twenty-five years, securities litigants have relied upon, and adapted to, the contribution rule under Section 10(b). Reversal of this status quo would interfere with the comprehensive and cohesive scheme of securities laws that has been in place for decades.

Moreover, a new rule barring contribution would result in the inequitable allocation of damages under Section 10(b). Plaintiffs could threaten lesser and secondary actors with liability for amounts wholly disproportionate to their degree of wrongdoing. Not only would this be inherently inequitable, but it would conflict with the fairness choice Congress made in providing contribution for every express securities action that closely resembles Section 10(b). By empowering securities plaintiffs to isolate and threaten selected defendants with full responsibility for theoretically massive damage claims, a rule of no contribution would also enhance the power of plaintiffs to coerce defendants into inequitable settlements.

The universal experience of the federal courts over the past two decades demonstrates that the contribution rule is easily manageable; it has led neither to undue complexity in securities proceedings nor reduced settlements of securities actions. To the contrary, it has enhanced enforcement of the securities laws by ensuring that the deterrent effect of those laws is borne by all wrongdoers, rather than merely those defendants whom plaintiffs, for their own tactical purposes, may choose to sue. Concerns about application of the rule provide no legitimate basis to turn back the clock twenty-five years, rearrange the dynamics of the securities enforcement arena, and ignore Congress's clear legislative choice on this matter.

ARGUMENT

This Court has held that there are two independent bases for recognizing a right to contribution under a federal cause of action: (1) "the affirmative creation" of the right by Congress "either expressly or by clear implication"; and (2) "the power of federal courts to fashion a federal common law of contribution." *Texas Industries*, 451 U.S. at 638. With respect to Section 10(b), both of these alternative tests are met. First, the statutory structure of the securities laws clearly evidences a congressional intent to allow contribution for securities fraud actions similar to the Section 10(b) action. Second, the federal common law principles that have traditionally governed Section 10(b) jurisprudence also favor a right to contribution. Whether utilizing a narow analytical approach based solely on congressional intent, or a more expansive, common law-based standard that looks both to the statutory scheme and to relevant historical and policy considerations, this Court should recognize a right to contribution under Section 10(b).

I. THE SECURITIES LAWS CLEARLY IMPLICATE A RULE OF CONTRIBUTION UNDER SECTION 10(b)

As noted, this Court has held that a right to contribution may arise if Congress created such a right "either expressly or by clear implication." *Texas Industries*, 451 U.S. at 638. When an underlying private right of action (such as that implied under Section 10(b)) is not created by Congress in the first instance, "it is to be expected" that Congress "will typically be equally silent or ambiguous on the question" of a right of contribution. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 541 U.S. 77, 94 (1981) (quotation omitted). In such circumstances, the Court must look beyond the narrow, implied statutory provision at issue for evidence of congressional intent, and turn for guidance to the entire statute and statutory scheme of which it is a part. "[C]ongressional intent can be inferred from the language of the statute, the statutory structure, or some other source." *Ibid.*

Understandably, the Court has followed this same approach in interpreting Section 10(b) and Rule 10b-5; for it is now well recognized that the implied right of action created thereunder is unique in the Court's jurisprudence. This Court has not indulged in the fiction that congressional intent can be fathomed with reference to Section 10(b) standing alone.[1] Instead, "faced with the awkward task of discerning [what] Congress intended [with respect to] a cause of action it really never knew existed," *Lampf*, 111 S. Ct. at 2780, the Court has looked to "the statute [and] statutory structure," of which Section 10(b) is a part—that is, the 1934 Securities Exchange Act and its related contemporaneous statute, the 1933

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[1] See *Lampf*, 111 S. Ct. at 2780 ("we have made no pretense that it was Congress' design to provide the remedy afforded"); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("[T]here is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy.") (footnotes omitted).

Securities Act, 15 U.S.C. § 77 *et seq.* "The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst*, 425 U.S. at 206. "We can imagine no clearer indication of how Congress would have balanced the policy considerations * * * than the balance struck by the same Congress in limiting similar and related protections." *Lampf*, 111 S. Ct. at 2780.[2]

In this instance, Congress's design throughout the 1933 and 1934 Acts is plain. In enacting express remedial provisions under those two statutes, Congress uniformly provided that the imposition of joint and several liability against multiple defendants should be paired with the right to contribution. As Professor Loss succinctly stated: "Those civil liability provisions of the 1933 and 1934 Acts that contemplate more than one defendant *do* contain provisions on contribution." L. Loss, *Fundamentals of Securities Regulation* 1036 (1988) (emphasis added).

Specifically, Congress expressly conferred a right to contribution for actions brought under Sections 9 and 18 of the Exchange Act (see 15 U.S.C. §§ 78i(e), 78r(b)), as well as Section 11 of the Securities Act (see 15 U.S.C. § 77k(f)).[3] This congressional action is highly probative

[2] See also *Kamen* v. *Kemper Financial Services*, 111 S. Ct. 1711, 1717 (1991) ("Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules * * * when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand."); *Blue Chip Stamps*, 421 U.S. at 736 (in defining the plaintiff class under Section 10(b), the Court relied on the bounds Congress "delineated for comparable express causes of action"); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 257 (1988) ("In the past, the scant legislative history of § 10(b) has led us to look at Congress' intent in adopting other portions of the Securities Act when we endeavor to discern the limits of private causes of action under Rule 10b-5.") (White, J., joined by O'Connor, J., concurring in part and dissenting in part) (citing *Ernst & Ernst*, 425 U.S. at 204-206).

[3] Congress's deliberativeness in coupling joint and several liability with contribution is noteworthy. Unlike today, when almost all jurisdictions favor contribution among joint tortfeasors (see p. 18 n.19, *infra*), the rule was to the contrary in the 1930's. Accordingly, Congress provided in the 1933 and 1934 Acts that contribution shall be recognized as if allowed under principles of "contract." See Loss, *supra*, at 1036.

given that this Court has repeatedly highlighted those statutory sections, particularly Sections 9 and 18, as close analogues to Section 10(b).[4] As this Court explained in *Lampf*,

> [Sections 9 and 18] target the precise dangers that are the focus of § 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.'

111 S. Ct. at 2781 (quoting *Ernst & Ernst*, 425 U.S. at 195).[5] Significantly, like Section 10(b), Sections 9 and

[4] Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. Similarly, Sections 9(e) and 18(a) of the same Exchange Act, respectively, provide causes of action on behalf of persons damaged by manipulation of the securities markets and by misleading statements in documents filed with the SEC. Section 11(a) of the Securities Act grants a cause of action to persons who purchase securities issued pursuant to a false or misleading registration statement.

[5] See also *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 45 (1977) (noting "the close relationship" between the anti-manipulation provision of Rule 10b-6, also promulgated under § 10(b), and § 9); *Basic Inc.*, 485 U.S. at 257-58 (looking to § 18 in interpreting the scope of § 10(b)) (White, J., joined by O'Connor, J., concurring in part and dissenting in part); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1548 (3d Cir. 1988), cert. denied, 488 U.S. 849 (1988) (noting that §§ 9 and 18 are "aimed at the same objectives" as § 10(b) and "aim to compensate the same type of injury"); *Ceres Partners* v. *GEL Associates*, 918 F.2d 349,

18 of the Exchange Act require more than mere negligence (*Ernst & Ernst*, 425 U.S. at 209 n.28), and thus allow defendants who are found to have acted with scienter to obtain contribution.[6] Accordingly, the provision of contribution for Section 10(b)'s counterparts "clearly implies" that Congress intended contribution to be available for actions impliedly brought under Section 10(b).[7]

Indeed, the few statutory provisions of the securities laws that do not expressly establish a right to contribution only confirm the conclusion that Congress intended contribution to be available for actions that "contemplate multiple defendants." Loss, *supra*, at 1017. Section 12 of the Securities Act, 15 U.S.C. § 77*l*, and Section 16 of the Exchange Act, 15 U.S.C. § 78p, both differ markedly from Sections 9, 11, and 18, as well as Section 10(b). Unlike the latter sections, which impose broad joint and several liability on all participants in a securities transaction, Sections 12 and 16 provide for narrowly targeted rescission and disgorgement remedies. Neither provision, historically or today, imposes broad-based codefendant liability. The failure of Congress to

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361-62 (2d Cir. 1990) (noting that §§ 9 and 18 "are closely related" to and "substantially overlap" § 10(b) and that a § 9 action "could as easily be brought under Rule 10b-5"; court also acknowledged the "permissible overlap between actions under § 10(b) and those under § 11 of the 1933 Act").

[6] Section 11 similarly allows intentional violators to obtain contribution from similarly situated defendants. The only limitation is that Section 11 precludes contribution in favor of a party liable for fraud from a party innocent of fraud. See 15 U.S.C. § 77k(f). This limitation has no bearing on Section 10(b), however, because that provision imposes liability only on defendants who acted with scienter.

[7] Thus, contrary to petitioners' suggestion (Br. 19-20), there *is* evidence that Congress "intended to benefit wrongdoers" under the securities laws by providing them with a right to contribution.

incorporate a contribution provision in these sections is thus of no significance to the contribution issue under Section 10(b).

Section 12, for example, expressly imposes liability for rescission on a person who sells a security in violation of that section "to the person purchasing such security from *him*." 15 U.S.C. § 77*l* (emphasis added). The applicability of this provision to more than one defendant has been settled (specifically under Section 12(1)) only recently, by this Court's decision in *Pinter v. Dahl*, 486 U.S. 622 (1988). In contrast to Sections 9, 11, and 18—which facially contemplate broad liability on the part of multiple defendants—the language of Section 12 "contemplates a buyer-seller relationship not unlike traditional contractual privity." *Id.* at 642.[8] Given

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[8] Because the common law had traditionally permitted rescission only between contracting parties, there was considerable support prior to this Court's decision in *Pinter* v. *Dahl* for the proposition that Congress intended to limit defendants under Section 12 to the immediate party who actually transferred title. See Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 Ford. Urb. L.J. 877, 924 (1987). Indeed, prior to *Pinter*, many lower courts had held that Section 12 required such strict privity. See, *e.g.*, *Sanders* v. *John Nuveen & Co.*, 619 F.2d 1222, 1226 (7th Cir. 1980); *Benoay* v. *Decker*, 517 F. Supp. 490, 494 (E.D. Mich. 1981), aff'd mem., 735 F.2d 1363 (6th Cir. 1984); *American Bank & Trust Co.* v. *Joste*, 323 F. Supp. 843, 846 (W.D. La. 1970). Although *Pinter* expanded the scope of defendants under Section 12(1) beyond persons who actually passed title to include other statutory sellers who successfully solicited a securities purchase, the Court nevertheless emphasized the limited class of statutory defendants and the restricted nature of the rescissionary remedy under Section 12. 486 U.S. at 650 n.26. Specifically, it emphasized that Section 12 does not impose general codefendant liability on all participants in a securities transaction. *Ibid.* Other courts since *Pinter* have also emphasized the narrow scope of Section 12. See, *e.g.*, *Wilson* v. *Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (following amicus brief of SEC, court rejected any analogy to Section 10(b) and denied collateral or aiding and abetting liability under Section 12).

this focus, Congress no doubt thought it unnecessary to confer a right to contribution for the action authorized under Section 12. See 5D A. Jacobs, *Litigation & Practice Under Rule 10b-5* § 264.02[c], at 11-443 n.14 (Callaghan 1992) ("While liability can now be imposed on a number of defendants under Section 12 of the Securities Act * * *, Congress probably did not include a provision relating to contribution in that section since the legislators conceived that only one person would be sued.").

Congress likewise had no reason to establish an express right to contribution under Section 16(b) of the Exchange Act. Again unlike Section 10(b) or its counterparts, Sections 9, 11, and 18, Section 16(b) does not provide for broad codefendant liability; it creates a special prophylactic rule calling for the disgorgement of short-swing trading profits in proscribed circumstances, irrespective of any wrongful intent. Damages are limited to the trader's specific profit; moreover, the section facially contemplates recapturing those profits only from the beneficial owner of the securities who benefitted from the trading (profits "realized by him").[9] Not surprisingly, this Court has summarily dismissed the suggestion that Section 16(b) might serve as an apt analogy for Section 10(b)—noting instead that it fundamentally "differs in focus from § 10(b) and from the other express causes of action [such as §§ 9 and 18 in the 1934 Act]." *Lampf*, 111 S. Ct. at 2780 n.5. It follows that as with Section 12, the absence of contribution in this section has no bearing on the issue of contribution under Section 10(b).[10]

[9] See *Baker* v. *BP America, Inc.*, 749 F. Supp. 840, 842-43 n.1 (N.D. Ohio 1990) ("The language of §§ 12(1) and 12(2) * * * and § 16(b) * * * suggests that Congress envisioned only a single defendant for cases brought under those sections.").

[10] The only other liability provision of the securities laws that does not specifically confer a right to contribution is the new insider trading provision in Section 20A, 15 U.S.C. § 78t-1. This Court recently has made clear, however, that, for purposes of interpreting Section 10(b), the contemporaneously enacted provisions of Sections 9 and 18 are the appropriate analogies and not Section 20A, enacted five decades later. See *Lampf*, 111 S. Ct. at 2781. Moreover, liability under Section 20A is limited to the profits made or loss avoided through insider trading. See 15 U.S.C. § 78t-1(b)(1). Thus, the provision is more like the disgorgement and rescission remedies of Sections 16(b) and 12 than the expansive damages remedies of Sections 9, 11, 18, and 10(b).

Similarly irrelevant is the absence of an express right to contribution under Section 15 of the Securities Act and Section 20(a) of the Exchange Act. Those provisions hold that controlling persons shall be liable "to the same extent as" the persons controlled by them. See 15 U.S.C. §§ 77*o*, 78t(a). They are thus derivative of and incorporate the underlying substantive provisions of the securities acts. If the substantive provision under which a controlling person is found liable provides for contribution, the controlling person is allowed to exercise that right as well.[11]

In short, both the "language of the [express provisions of the 1933 and 1934] statute[s] [and] the statutory structure" (*Northwest Airlines*, 451 U.S. at 94), demonstrate that, for every express cause of action of the securities laws that contemplates joint and several liability, Congress uniformly chose a bittersweet path—pairing the express liability with an entitlement to con-

[11] See Loss, *supra* at 1036 n.131 (although Section 11's contribution provision "does not literally cover controlling persons liable under § 15, they nevertheless fall within the scope of § 11(f) because § 15 specifies the same *prima facie* liability as § 11"); *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), cert. denied, 452 U.S. 963 (1981) (§ 15 controlling persons liable under § 11 are subject to § 11's contribution provision); M. Kaufman, *Securities Litigation: Damages* § 10:4, at 11 (Callaghan 1989) ("Controlling persons are liable to injured plaintiffs 'to the same extent' as are the primary violators. Liability is joint and several, making the principal liable for the full amount of the plaintiff's damages. Controlling persons may seek indemnification and contribution from their agents, provided that the agent's pockets are deep enough.") (footnote omitted).

tribution. From the standpoint of putative defendants under Section 10(b), petitioners wish to retain the bitter and to discard the sweet. Such a position is inconsistent with the "clear implication" of the securities acts crafted by Congress and should be rejected by this Court.

II. THIS COURT SHOULD RECOGNIZE A RIGHT OF CONTRIBUTION UNDER SECTION 10(b) AS A MATTER OF FEDERAL COMMON LAW

In addition to finding that a right to contribution under Section 10(b) is clearly implied by the securities laws, this Court should also recognize that right as a matter of federal common law. As stated in *Texas Industries*, "[i]n areas where federal common law applies, the creation of a right to contribution may fall within the power of the federal courts." 451 U.S. at 641. Section 10(b) is just such an area, and this Court can and should exercise that power to endorse a right to contribution under that provision.

A. Section 10(b) Is An "Area[] Where Federal Common Law Applies"

It is by now settled that Section 10(b) is a "nontraditional" provision (*Lampf*, 111 S. Ct. at 2779), and, as such, an "area[] where federal common law applies" (*Texas Industries*, 451 U.S. at 641). Time and again, this Court has stated that, in light of the absence of congressional intent respecting Section 10(b), the implied cause of action created thereunder cannot meaningfully be justified or analyzed under strict modern intent-based standards. See p. 5 & n.1, *supra*. Thus, federal courts recognize and give shape to the implied right of action under Section 10(b) by application of common law principles, as informed by historical practice and issues of policy. As this Court explained in *Blue Chip Stamps*, "[w]hen we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little

more than a legislative acorn. * * * It is therefore proper that we consider * * * what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." 421 U.S. at 737.[12]

Indeed, the common law authority of federal courts to fill gaps in the federal securities laws was reaffirmed two terms ago in *Kamen*, 111 S. Ct. at 1717, with reference to creating a demand requirement under the Investment Company Act of 1940. While *Kamen* chose to incorporate state law as the federal common law rule of decision—an approach which, if followed here, manifestly would yield a right of contribution [13]—the Court left no doubt that it was acting pursuant to federal judicial power. See *ibid.*

Petitioners nevertheless argue that the common law power is inapposite because contribution involves a sep-

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[12] Accord *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991) (noting that this Court looks "to policy reasons for deciding where the outer limits of the right [of action under § 10(b)] should lie"); *Basic Inc.*, 485 U.S. at 231 (noting the various "common-law requirements" of a Section 10(b) violation); *id.* at 253 ("the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on * * * common law doctrines") (White, J., joined by O'Connor, J., concurring in part and dissenting in part); *Nelson* v. *Bennett*, 662 F. Supp. 1324, 1329 n.8 (E.D. Cal. 1987) ("Having thus 'created' the remedy in the first place, the judiciary has the continuing authority, as a matter of common law, to flesh out the precise contours of the implied private cause of action.").

[13] A decade ago the Court recognized that the states already had overwhelmingly adopted a right of contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 86-87 & n. 17. The same holds true under state blue-sky securities laws. See *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266 n. 48 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979). See Point II(B)(1) *infra*.

arate cause of action that should be analyzed under this Court's curent intent-based jurisprudence governing implied rights of action. See Br. 17-18. This argument is without merit.[14] As described above, the Section 10(b) cause of action is an historical anomaly, created without the benefit of congressional intent. Unless and until that action is eliminated, the same federal common law principles used to create the claim in the first instance must, of necessity, be applied to any essential issue related to the action, including contribution. Just as this Court has federal common law power to recognize a right of contribution for admiralty causes of action (see *Texas Industries*, 451 U.S. at 642), so too it has power to confer a right of contribution for the wholly judicially created action under Section 10(b).[15]

Moreover, the securities laws do not recognize the artificial compartmentalization between substantive causes of action and rights of contribution suggested by petitioners. In Section 11 of the 1933 Act and Sections 9 and 18 of the 1934 Act, the creation of joint and several liability is expressly circumscribed by the right to seek contribution. As such, the very underlying liability among securities codefendants is defined and complemented by the basic equitable principle that a person who shares that liability with another should not bear the sole risk and

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[14] While the claim of contribution happens in this case to have been implemented through a separate later lawsuit, such claims can be—and typically are—raised like any other cross claim in the primary action.

[15] See *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 616 (N.D. Ill. 1987) ("Since federal courts have implied a right of action under Section 10(b), for the court to now focus on legislative intent in deciding the contribution issue would be incongruous with the analysis that created a Section 10(b) right of action.").

burden of payment. See *Alvarado Partners, L.P.* v. *Mehta*, 723 F. Supp. 540, 549 (D. Colo. 1989).[16]

Finally, the Court's refusal to exercise federal common law power to imply a right to contribution in *Texas Industries* and *Northwest Airlines* in no way casts doubt on its power to fashion a federal common law rule of contribution under Section 10(b). As noted above, the Court specifically acknowledged in *Texas Industries* that the federal courts possess the power to create a right to contribution "[i]n areas where federal common law applies." 451 U.S. at 641. And, significantly, in both cases the Court specifically reserved judgment on the appropriateness of implying contribution under the federal securities laws. See *Northwest Airlines*, 451 U.S. at 91 n.24; *Texas Industries*, 451 U.S. at 640 n.11.

More importantly, in refusing to create a contribution rule, the Court in both cases relied primarily on the existence of comprehensive and detailed remedial schemes that expressly conferred private rights of action, while at the same time omitting any correlative right of contribution. See *Northwest Airlines*, 451 U.S. at 93-94, 97; *Texas Industries*, 451 U.S. at 644-645. The omissions strongly suggested that Congress did not intend to confer a right to contribution. Accordingly, it would have been inappropriate for this Court to have overturned that policy choice by recognizing contribution as a matter of federal common law.

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[16] In another context, the Court in dictum has characterized contribution as a new cause of action, rather than a remedy. See *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1034 n.6 (1992). That characterization has no bearing on the proper standard to be applied in implying a right to contribution under a statute where Congress repeatedly circumscribed the underlying liabilities by a corresponding right to contribution.

By contrast, with Section 10(b) "[w]e are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." *Blue Chip Stamps*, 421 U.S. at 749. Accordingly, *Texas Industries* and *Northwest Airlines* in no way cast doubt on this Court's authority to exercise judicial power in accordance with common law practice and principles well recognized for decades under Section 10(b).

B. Federal Common Law Principles Favor Retention Of The Longstanding Contribution Rule Under Section 10(b)

Two factors favor the exercise of this Court's common law power to recognize a right of contribution under Section 10(b). The first is the clear evidence of congressional intent, as demonstrated by Congress's provision of contribution in every express cause of action of the securities laws that contemplates more than one defendant. See Point I, *supra*. Not only does that evidence satisfy the "clear implication" standard of *Texas Industries*, but it also provides a cogent argument for recognizing contribution as a matter of federal common law, particularly when combined with the policy considerations that have become the operating framework for analysis under the securities laws.

1. *The Twenty-Five Year Acceptance Of Contribution In Section 10(b) Actions Has Established Its Legitimacy As An Element Of The Statutory Scheme*

Like the Section 10(b) cause of action itself, a right to contribution for such actions has long been part of the fabric of securities law litigation. Indeed, the right to contribution under Section 10(b) was first implied in 1968—almost a quarter of a century ago. See *de Haas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968). "Since *deHaas*, the courts considering the question have almost without exception held that a right to contribution exists in actions under rule 10b-5." Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 539 (1981).[17]

This "longstanding acceptance by the courts" of the contribution rule, "coupled with Congress' failure to reject [it]," argue significantly in favor of its recognition by this Court. See *Blue Chip Stamps*, 421 U.S. at 733.[18] Indeed, the implied right of contribution under Section 10(b) now has been recognized by the federal courts for

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[17] The Second, Fourth, Fifth, Seventh and Ninth Circuits have all found a right to contribution under Section 10(b). See *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991); *Smith* v. *Mulvaney*, 827 F.2d 558 (9th Cir. 1987); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); *Heizer Corp.* v. *Ross*, 601 F.2d 330 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd per curiam, 442 F.2d 1346 (2d Cir. 1971), cert. denied, 404 U.S. 941 (1971). In addition, dozens of district courts around the country have recognized such a right. Significantly, no court reached a contrary conclusion until 1988—20 years after the right to contribution was first established. See *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-86 (D. Minn. 1988). And since 1988, only two other courts have rejected the contribution rule under Section 10(b). See *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *Robin* v. *Doctors Officenters Corp.*, 730 F. Supp. 122 (N.D. Ill. 1989).

[18] See also *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384-85 (1983) (in adopting particular interpretation of Section 10(b), the Court relied on the "consistent line of judicial decisions" in favor of the interpretation and Congress's failure to reject it); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-82 (1982) (in upholding implied private right of action under the Commodity Exchange Act, the Court relied on the fact that "the federal courts routinely and consistently had recognized" such an action, and that Congress had failed to reject it); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 n.19 (1979) (in refusing to imply a cause of action under § 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), the Court stressed the absence of a "history of longstanding lower-court interpretation" in favor of such an action).

the same length of time as was the implied claim itself under Section 10(b) when this Court first endorsed it (see *id.* at 730)—an endorsement which similarly was based in large measure on "[j]udicial interpretation and application, legislative acquiescence, and the passage of time." *Basic Inc.*, 485 U.S. at 230-31. To reverse the rule at this late date would interfere with the coherent and cohesive scheme of federal securities litigation that has operated for the past quarter of a century.

This Court also recently has looked to state law rules in interpreting the federal securities acts. See p. 13, *supra*. Here, too, the result is the same. Only four states do not allow contribution among joint tortfeasors.[19] And perhaps even more directly pertinent, state securities statutes likewise now overwhelmingly endorse contribution. See p. 13 n.13, *supra*.

2. *Prohibiting Contribution Would Unfairly Allocate Liability Under Section 10(b)*

Barring contribution would undercut the purposes of the securities laws and result in substantial unfairness by allowing some wrongdoers to escape responsibility while rendering others liable for amounts wholly disproportionate to the extent of their wrongdoing. As this Court has explained, "a more 'equal distribution of justice' can best be achieved by ameliorating the common-

[19] In addition to the 39 states and the District of Columbia cited in *Northwest Airlines*, 451 U.S. at 87 n.17, the following states allow for contribution among joint tortfeasors: Connecticut (see Conn. Gen. Stat. Ann. § 52-572h (West 1991)); Montana (Mont. Code Ann. § 27-1-703 (1991)); New Hampshire (N.H. Rev. Stat. Ann. § 507:7-f (1991)); Ohio (Ohio Rev. Code Ann. § 2307.31 (1991)); Oklahoma (Okla. Stat. Ann. Tit. 12 § 832 (West 1992)); South Carolina (S.C. Code Ann. § 15-38-20 (Law Co-op 1991)); Washington (Wash. Rev. Code § 4.22.040 (West 1992)). Even Vermont and Wyoming allow contribution under certain circumstances. See Vt. Stat. Ann. tit. 7 § 501 (1991) (civil damages action for unlawful sale of intoxicating liquors); Wyo. Stat. § 34.1-3-116 (1977) (liability on negotiable instruments).

law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974).[20] By providing a right to contribution for every express cause of action comparable to Section 10(b), Congress obviously agreed that contribution represents the more equitable rule.

Prohibiting contribution is particularly unfair in light of the wide variation in culpability among Section 10(b) defendants.[21] Without contribution, secondary actors,

[20] See also *Nelson*, 662 F. Supp. at 1328 (under a rule of no contribution, "plaintiffs could unilaterally force one of many wrongdoers to bear the entire loss, even though others may be equally or more to blame."); Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?* XVI Suffolk L. Rev. 983, 988 (1982) (rule of no-contribution "ignores basic principles of fairness by thrusting the entire loss onto one unfortunate defendant who is only partially at fault"); *Odd Bergs Tankrederi A/S* v. *S/T Gulfspray*, 650 F.2d 652, 654 (5th Cir. 1981) ("Contribution * * * is based on the equitable theory that even though a wrongdoer may be liable for damages to the injured party, it should not have to bear the entire amount of damages when others are partly at fault"); Adamski, 66 Iowa L. Rev. at 541 ("[F]undamental fairness requires that the financial loss caused by joint wrongdoers be apportioned among them. The governing principle of contribution is that no obligor should be unjustly benefited at the expense of another.") (footnote omitted).

[21] See Branson, *Collateral Participant Liability Under the Securities Laws—Charting the Proper Course*, 65 Or. L. Rev. 327, 329-30 (1986) (noting that "[m]any defendants are only secondarily present in a transaction. They will have been engaged in 'customary business activities, such as loaning money, managing a corporation, preparing financial statements, distributing press releases, completing brokerage transactions, or giving legal advice.' In so doing, these 'collateral participants' ' conduct, or failure to act, has touched the transaction that the plaintiff claims has wronged him. Corporate officers and directors, accountants, business or public relations consultants, consulting and other engineers, brokers, and lawyers

such as underwriters, lawyers or accountants, who are only tangentially related to the wrongdoing, could nonetheless be held liable for the entire vast judgment, while the primary wrongdoer is permitted to escape responsibility; moreover the plaintiff could elect, for purely tactical or collusive reasons, to achieve that very result. Only a contribution rule can ensure that "[p]articipants on the fringe of a securities fraud case [do] not bear the same burden as those at its heart." Note, *All Things Being Unequal: Use of the Doctrine of Relative Culpability in Apportioning Contribution*, 57 U. Cinn. L. Rev. 769, 785 (1988).

In the final analysis, apportioning liability without contribution would constitute an irrational means of enforcing the securities laws. Plaintiffs' personal, tactical, and litigation priorities would be the unilateral determinant of liability, rather than any realistic assessment of actual or relative fault. ["R]equiring one of many participants to pay the entire judgment merely because the plaintiff, through oversight, whim, or collusion with other wrongdoers, fails to sue all of the wrongdoers would be an arbitrary and unfair manner in which to redress violations of Section 10(b)." Adamski, 66 Iowa L. Rev. at 541-542 (footnotes omitted).

3. *Abolition Of The Contribution Rule Would Significantly Increase The Power Of Plaintiffs To Coerce Unfair Settlements*

Abolition of the contribution rule under Section 10(b) would also reward meritless strike suits brought against "deep pocket" defendants by plaintiffs in the hope of ob-

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are typical categories of collateral participants.") (footnotes omitted); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 Pa. L. Rev. 597, 599 (1972) (discussing varying degrees of defendants' knowledge, participation and duty); Adamski, 66 Iowa L. Rev. at 541 ("Numerous parties with varying degrees of participation in the fraudulent scheme may be responsible for a violation of Section 10(b).").

taining a quick settlement. This Court has recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. In particular, in light of the massive theoretical damages which can arise when millions of shares of securities change hands, the Court has recognized that

> in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

Id. at 740.[22] Indeed, "Congress itself recognized the po-

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[22] The particularly abusive nature of securities litigation has been repeatedly noted by the lower courts which routinely handle such cases. See, *e.g.*, *Romani* v. *Shearson Lehman Hutton, Inc.*, 929 F.2d 875, 878 (1st Cir. 1991) ("We have been especially rigorous in demanding such factual support in the securities context to minimize the chance 'that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement, rather than in the hopes that the process will reveal relevant evidence.'") (quotation omitted); *Wayne Investment, Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11, 13 (1st Cir. 1984) (noting tendency to file groundless suits to gain *in terrorem* increment of settlement value); *Decker* v. *Massey-Ferguson, Ltd.*, 681 F.2d 111, 116 (2d Cir. 1982) (noting that securities plaintiffs use "conclusory generalizations * * * to set off on a long and expensive discovery process in the hope of * * * obtaining a substantial settlement"); *Ross* v. *A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir. 1979) (noting tendency to raise baseless claims simply to force settlement), cert. denied, 446 U.S. 946 (1980); *Konstantinakos* v. *FDIC*, 719 F. Supp. 35, 38 (D. Mass. 1989) ("in securities fraud cases . . . the strike suit value of a complaint is high."); *DMI Furniture, Inc.* v. *Brown, Kraft & Co.*, 644 F. Supp. 1517, 1529

tential for nuisance or 'strike' suits in this type of litigation." [23] *Ibid.*

In construing the securities laws, this Court, not surprisingly, has taken into account the undesirability of rewarding strike suits.[24] Here, if contribution were abolished, plaintiffs would be vested with new power to isolate and threaten defendants with the risk of sole liability for damage judgments. The risk of substantial unilateral liability [25] would expand the pressure already felt by securities defendants to settle for amounts that bear no relation to the merits of the lawsuit or any realistic assessment of the extent of a defendant's actual or comparative culpability.[26]

(C.D. Cal. 1986) ("Securities litigation not only is very expensive, it presents significant opportunities for abuse. * * * The tendency in every case is to look to the 'deep pocket.'") (footnotes omitted).

[24] In this regard, a recent comprehensive study of securities class actions argued that "[t]he strength of the plaintiffs' case on the merits thus did not appear to be a significant factor in determining the [settlement] outcomes of these cases." Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 500 (1991).

[24] See *Blue Chip Stamps*, 421 U.S. at 740-41 (threat of strike suits counseled against expanding the class of plaintiffs who may sue under Section 10(b)); *Virginia Bankshares*, 111 S. Ct. at 2760 (director's disbelief or undisclosed motivation alone not sufficient to sustain § 14(a) action because "the temptation to rest an otherwise nonexistent § 14(a) action on psychological enquiry alone would threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* sought to discourage").

[25] As noted, the only express provision of the 1934 Act, of which Section 10(b) is a part, which fails to provide explicitly for contribution is Section 16(b). But there, damages are capped and limited to the profits actually realized by the short-swing trade. Indeed, if there is more than one beneficial owner of a traded security, disgorgement remains determined by "the amount recoverable as if there were only one beneficial owner." 17 C.F.R. § 240.16a-1(a)(3) (1992).

[26] See Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170, 1172 (1941) (no-contribution rule

4. *The Contribution Rule Has Not Impaired Judicial Management Or Enforcement Of The Securities Laws*

In arguing against the contribution rule under Section 10(b), petitioners stress a number of practical problems that have allegedly resulted from the rule. Specifically, they argue that the contribution rule has increased the complexity and cost of securities actions, reduced settlements and partial settlements of cases, and decreased the deterrent effect of the securities laws. See Br. 37-40. These arguments offer no support for eliminating the right to contribution under Section 10(b); they would apply equally to allowing contribution under *any* provision of the securities laws. In providing contribution throughout the securities statutes, Congress considered and rejected the notion that the costs of the contribution rule outweigh its benefits. That policy choice should be respected by the courts in construing Section 10(b).

Furthermore, nothing in the record or in reality supports petitioners' suggestion that contribution under Section 10(b) has unduly increased the complexity of proceedings under the securities laws. Since 1933, "federal trial courts have been able to successfully apply a contribution rule established under the securities law." Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. Ill. L.F. 389, 411. And, in light of the availability of contribution under the other express provisions of the

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allows plaintiff to induce defendant into inflated settlement by threatening to sue him alone); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1552 (1980) (barring contribution increases "the ability of plaintiffs to coerce defendants into unfavorable settlements through the threat of tremendous liability"); Note, XVI Suffolk L. Rev. at 988 (although a defendant "may have been only a minor participant in the actions that caused the plaintiff's injury, and might never be adjudged liable, he will feel compelled to settle with the plaintiff to avoid the catastrophic consequences of solitary responsibility").

securities laws, the federal courts have had no choice but to develop and apply a body of contribution law; that would remain true whether or not a right to contribution is implied under Section 10(b).[27] In fact, since securities fraud plaintiffs frequently allege claims under federal and state provisions providing for contribution alongside claims under Section 10(b), partial settlements in any event must take into account and fashion protection against the possibility of nonsettling defendants raising claims for contribution.

Nor is there evidence that contribution has decreased settlements or partial settlements of Section 10(b) actions. Contrary to petitioners' suggestion (Br. 39), cases brought under Section 10(b) have been routinely settled in the Ninth Circuit, as elsewhere, despite the availability of contribution.[28] Indeed, as one commentator noted, "the settlement rate for securities class actions is much higher than for civil litigation generally." Alexander, 43 Stan. L. Rev. at 525. A classic example of a securities fraud case involving numerous defendants that was settled in a systematic manner is *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379 (D. Ariz. 1989), aff'd, 955 F.2d 1268 (9th Cir. 1992). Rather than acting as a barrier to settlement, the availability of contribution helped to expand the universe of potentially liable defendants.

Furthermore, litigants and the federal courts readily have adopted litigation devices to encourage early, partial settlements. Plaintiffs and early settling defendants can agree to indemnification or judgment-reduction provisions whereby later asserted claims against a settling defendant are indemnified against or are set off by reducing any subsequent judgment procured against the nonsettling defendants. See *In re Ivan F. Boesky Securities Litigation*, 948 F.2d at 1369. Or settling parties can apply for a settlement bar order, by which contribution claims by nonsettling defendants can be barred and partial settlements treated as conclusive and fair. While the courts have adopted different approaches to settlement bars,[29]

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[27] Federal courts also must craft contribution rules with respect to other federal causes of action. See, *e.g.*, *Cooper Stevedoring Co.*, 417 U.S. 106 (holding contribution is available among joint tortfeasors in admiralty cases). And "courts, while exercising diversity jurisdiction, are experienced in applying contribution rules under state law, and various procedural rules have assisted trial courts in the management of complex cases." Polden & Sullivan, *Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis*, 20 Harv. J. on Legis. 397, 413 (1983) (footnote omitted).

[28] See, *e.g.*, *Waller* v. *Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *Roberts* v. *Heim*, 1991 WL 427888 (N.D. Cal. Aug. 28, 1991); *In re United Energy Corporation Solar Power Modules Tax Shelter Investment Securities Litigation*, 1989 WL 73211, *4 (C.D. Cal. March 9, 1989); *Kirkorian* v. *Borelli*, 695 F. Supp. 446 (N.D. Cal. 1988); *Nelson*, 662 F. Supp. at 1338; *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *Harmsen* v. *Smith*, 1985 WL 5824 (S.D. Cal. Sept. 30, 1985); *Harrison* v. *Sheats*, 608 F. Supp. 502 (E.D. Cal. 1985); *Bush* v. *Rewald*, 1986 WL 15338 (D. Hawaii Sept. 4, 1986); *Smith* v. *Mulvaney*, 1985 WL 29953, *2 (S.D. Cal. June 5, 1985); see also *In re Ivan F. Boesky Securities Litigation*, 948 F.2d 1358 (2d Cir. 1991); *In re Allstar Inns Securities Litigation*, 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991); *O'Brien* v. *National Property Analysts Partners*, 739 F. Supp. 896, 898 (S.D.N.Y. 1990); *Langford* v. *Fox*, 1988 WL 70351 (S.D.N.Y. Sept. 28, 1988); *First Federal Savings & Loan* v. *Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029 (S.D.N.Y. 1986); *Bottaro* v. *Hatton Associates*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982); *Jezarian* v. *Csapo*, 479 F. Supp. 469 (S.D.N.Y. 1979).

[29] For discussion of the various forms of settlement bars, see *In Re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020 (2d Cir. 1992) (discussing settlement bars under ERISA); *In re Jiffy Lube Securities Litigation*, 927 F.2d at 160-61 & n.3; *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990); *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), cert. denied, 493 U.S. 1024 (1990). Because resolution of the proper settlement bar mechanism in securities cases is not part of the question presented, there is no need for this Court to decide that issue here.

plaintiffs and defendants for decades have lived with these rules in the many jurisdictions and with respect to the many federal and state-law claims that allow for contribution.

Equally meritless is petitioners' argument that the contribution rule has interfered with the enforcement and deterrence goals of the federal securities laws. As most courts and commentators have recognized, by broadening the universe of potential defendants subject to suit and increasing the likelihood that culpable defendants will not, for arbitrary or collusive reasons, escape liability, the contribution rule has enhanced deterrence.[30] Indeed, most economists agree that increasing the persons exposed to the likelihood of punishment is a greater deterrent than the severity of the penalty.[31] And Congress obvi-

[30] See, *e.g.*, *Heizer*, 601 F.2d at 332 ("[b]y apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties"); *Nelson*, 662 F. Supp. at 1328 ("contribution ensures that the deterrent effect of the law will be felt by all persons contemplating liability, rather than just those persons most likely to be named as defendants by the plaintiffs"); Sullivan, 1980 U. Ill. L.F. at 412 ("contribution increases deterrence by preventing influential violators from avoiding litigation"); Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447, 456 (1981) (the contribution rule is "less likely to produce overdeterrence or underdeterrence caused by the misallocation of liability than the rule of no contribution"); Adamski, 66 Iowa L. Rev. at 541 (the contribution rule "better serves the deterrent purposes of the securities laws").

[31] See, *e.g.*, Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, 964 (1966); R. Cyert & J. March, *A Behavioral Theory of the Firm* 119 (1963); O. Williamson, *The Economics of Discretionary Behavior* 48 (1978); Becker, *Crime and Punishment: An Economic Approach*, in Essays in the Economics of Crime and Punishment 9-11 (1974); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099 (1977); Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in Essays in the Economics of Crime and Punishment III (1974); Polinsky & Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 Am. Econ. Rev. 880 (1979).

ously made its view clear on this issue by expressly providing contribution for actions analogous to Section 10(b).

Finally, the contribution rule can promote enforcement of the securities laws by aiding in the discovery of Section 10(b) violators. Defendants accused of participating in a common scheme can have the incentive to bring other wrongdoers to light and to demonstrate their culpability.[32] Petitioners have identified no compelling reason to eliminate what has proven to be a fair and productive aspect of the securities law enforcement scheme.

* * * *

The "clear implication" of the securities laws favoring contribution for securities fraud defendants, along with the "longstanding acceptance by the courts" of that rule (*Blue Chip Stamps*, 421 U.S. at 733), and the policy considerations that this Court is "free to weigh in deciding this case" (*id.* at 749), strongly favor retention by this Court of a right to contribution under Section 10(b).

[32] See Note, *Bucking the Trend: An Argument in Favor of a Fiduciary's Implied Right to Contribution Under ERISA*, 76 Va. L. Rev. 1377, 1405 (1990) ("allowing for the possibility of a right to contribution may increase the incentive of a single defendant to provide evidence against [another defendant] so as to avoid bearing the full weight of the judgment"); Note, XVI Suffolk L. Rev. at 989 (actions for contribution "benefit both the plaintiff and the legal system by facilitating discovery"); Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 Colum. L. Rev. 123, 125 (1965) (under contribution rule, plaintiff may gain advantage from presence of multiple tortfeasors who have incentive to demonstrate fault of co-defendants).

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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